88-426

Supreme Court, U.S.
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NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

AUBURN NATIONAL BANK OF AUBURN,
A National Banking Association, *Petitioner*,

v.

FRANCIS M. SANDA
and
EDWARD GOSSETT, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA

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QUESTIONS PRESENTED

1. Whether it is a denial of due process for the State of Indiana to give no notice to mortgagees before the issuance of a tax deed, which terminates the rights of redemption and reversion, particularly when no actual notice was given to the owners or mortgagees at the time of the tax sale.

2. Whether Indiana may compel a mortgagee to take affirmative action in order to obtain notice of a tax sale, and whether a successor mortgagee, subrogated to the rights of the first, has standing to assert the lack of notice required by due process.

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceeding below were the Petitioner, Auburn National Bank of Auburn, A National Banking Association, and the Respondents, Francis M. Sanda and Edward Gossett.

Pursuant to Rule 28.4(c), the constitutionality of certain statutes of the State of Indiana may be drawn into question, and 28 U.S.C. § 2403(b) may be applicable. Accordingly, this Petition shall be served upon the Attorney General of the State of Indiana.

Petitioner, Auburn National Bank of Auburn, A National Banking Association, is a wholly owned subsidiary of Auburn National BanCorporation, a one-bank holding company.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA

The petitioner, Auburn National Bank of Auburn, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the Court of Appeals of Indiana entered in the above-entitled proceeding on October 19, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals of Indiana is reported at 514 N.E.2d 309, and is reprinted in the appendix hereto, p. A-1, *infra*.

The memorandum decision of the Supreme Court of Indiana denying transfer has not been reported. The docket entry therefore is reprinted in the appendix hereto, p. A-22, *infra*.

JURISDICTION

Petitioner brought this suit in the Superior Court of Marion County, Indiana, by filing its complaint to set aside a tax deed and quiet title to real estate. Petitioner alleged that the tax sale and the issuance of the tax deed were void in that no notice was given to the property owners and lien holders of record as required by statute and by the Constitution of the United States of America. The trial court found for the petitioner, holding that the failure to give notice to the owners and mortgagees was a denial of due process. See p. A-11, *infra*.

On the appeal of respondent Edward Gossett, the Court of Appeals of Indiana, on October 19, 1987, reversed, holding that the petitioner was without standing to raise the lack of notice of the tax sale, and that the issuance of tax deed did not constitute state action for which notice was required. See p. A-1, *infra*.

Petitioner sought rehearing before the Indiana Court of Appeals on November 9, 1987, which petition was denied on December 7, 1987. See p. A-22, *infra*.

Petitioner filed its petition for transfer to the Supreme Court of Indiana on December 28, 1987, and that petition was denied on June 9, 1988. See P. A-22, *infra*.

The jurisdiction of this court to review the judgment of the Indiana Court of Appeals is invoked under 28 U.S.C. 1257(3).

STATUTES INVOLVED

U.S. Const. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ind. Code § 6-1.1-24-4 (1981) *Notice of sale to owner* (appended hereto at p. A-23).

Ind. Code § 6-1.1-24-4.2 (1981) *Notice of sale to mortgagee* (appended hereto at p. A-23).

Ind. Code § 6-1.1-24-9 (1981) *Certificate of sale, contents; purchaser's lien; assignments* (appended hereto at p. A-24).

Ind. Code § 6-1.1-25-1 (1981) *Redemption* (appended hereto at p. A-24).

Ind. Code § 6-1.1-25-4 (1981) *Execution and delivery of deed to purchaser* (appended hereto at p. A-25).

Ind. Code § 6-1.1-25-6 (1981) *Notice to former owner before tax deed is executed and delivered* (appended hereto at p. A-26).

Ind. Code § 6-1.1-25-7 (1981) *Deadline for execution of deed* (appended hereto at p. A-27).

STATEMENT OF THE CASE

Petitioner instituted this action on October 26, 1984, seeking to set aside a tax deed issued to respondent Edward Gossett, and to quiet title to the subject real estate in respondent Francis M. Sanda, or alternatively that the tax deed be given limited validity, but that it be subject to the mortgage interest of the petitioner. Petitioner alleged as grounds for relief the failure of the Auditor of Marion County, Indiana to give notice of the tax sale or notice of the proposed issuance of the tax deed to the property owner and lienholders of record.

O. S. I., Inc. acquired the subject real estate, commonly known as 6415 West Washington Street, Indianapolis, Indiana (West Washington Street property), by deed dated September 1, 1977 and recorded September 14, 1977 in the office of the recorder of Marion County. Said deed contained the notation:

Tax Statement: C/O Robt. T. Wildman
2450 #1 Indiana Sq.

This notation is used to establish the requested mailing address for tax purposes.

Thereafter, on February 20, 1978, First Federal Savings and Loan Association of Indianapolis ("First Federal") was granted a mortgage on the subject real estate, which mortgage was recorded on February 21, 1978 in the office of the recorder of Marion County and remained of record until its release by instrument recorded on July 18, 1984.

Respondent Francis M. Sanda was an officer and shareholder in O. S. I., Inc., and was personally liable on the First Federal note secured by the mortgage.

The real estate property taxes due on the West Washington Street property became delinquent and on June 25, 1982, the Marion County Auditor, pursuant to Ind. Code § 6-1.1-24-4 (1981), sent a notice of tax sale by certified mail addressed to

O S I Inc
% Ken Sexton
Suite G
920 N Shadeland Ave
Indianapolis IN 46219

That notice read in pertinent part as follows:

PURSUANT TO THE LAWS OF THE INDIANA GENERAL ASSEMBLY, NOTICE IS HEREBY GIVEN THAT THE FOLLOWING DESCRIBED REAL PROPERTY IS LISTED FOR SALE FOR DELINQUENT TAXES AND/OR SPECIAL ASSESSMENTS, SUCH SALE TO BE HELD AUGUST 09, 1982 IN ROOM 230, THE PUBLIC ASSEMBLY ROOM, CITY-COUNTY BUILDING, MARION COUNTY COURTHOUSE, INDIANAPOLIS, INDIANA AT 10:00 A.M.

PROPERTY LOCATION: 6415 W WASHINGTON ST

. . .

NO PROPERTY ABOVE DESCRIBED SHALL BE SOLD IF, AT ANY TIME BEFORE SALE, ALL DELINQUENT TAXES AND SPECIAL ASSESSMENTS ARE PAID, BY CASH OR CERTIFIED CHECK. REFER ANY QUESTIONS TO THE COUNTY TREASURERS OFFICE — 317-236-4444. (Transcript Volume 3, page 488, Plaintiff's Exhibit 13).

While one Kenneth Sexton had been an employee of O. S. I., Inc. until December, 1981, he was not so employed after that date. Neither did O. S. I., Inc. own a restaurant located at 920 North Shadeland Avenue, Indianapolis, Indiana. The record does not reflect why this notice of tax sale was sent to Kenneth Sexton rather than to the address indicated on the deed by which O.S.I., Inc. took title. The notice was returned undelivered.[1]

First Federal was not given notice of the pending tax sale. Ind. Code § 6-1.1-24-4.2 (1981) required mortgagees desiring notice of tax sales on mortgaged property to annually request the notice for each property and pay a fee therefor.[2] First Federal had not requested such notice on the West Washington Street property, and no notice was directed to it.

On August 10, 1982, respondent Gossett purchased the West Washington Street property at the tax sale auction for the amount of Six Thousand Two Hundred Thirteen Dollars and Seventy-One Cents ($6,213.71), and a certificate of sale granting Gossett a lien against the real property pursuant to Ind. Code § 6-1.1-24-9 (1981) was issued.

In the summer of 1984, O. S. I., Inc. was liquidated. Respondent Sanda received the West Washington Street property as his share of the corporation. Contemporaneously, respondent Sanda obtained a loan from Auburn National Bank in the amount of Two Hundred Thousand Dollars ($200,000.00), which loan was secured by a new mortgage on the West Wash-

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[1] The Indiana statutory scheme provides at various points for notice by publication. Since the mortgagees herein were always reasonably identifiable, and since constructive notice by publication has already been ruled insufficient in this instance, this petition will confine itself to a discussion of the facts and statutes dealing with actual notice.

[2] This statute was amended in 1986 to require notice to all mortgagees at the time of the tax sale.

ington Street property. This loan represented the value of the property at the time. The loan proceeds were escrowed and utilized to satisfy the First Federal mortgage and note on which Sanda was liable. A deed from O. S. I., Inc. to Sanda and the mortgage from Sanda to Auburn National Bank were recorded in the Marion County Recorder's office on June 29, 1984.

Also on June 29, 1984, the Marion County Auditor sent a "Notice of Tax Sale Redemption or Issuance of Deed" by certified mail, pursuant to Ind. Code § 6-1.1-25-6 (1981), addressed to:

> O S I Inc
> % Ken Sexton
> Suite G, 920 N. Shadeland Avenue
> Indianapolis, IN 46219

This notice was likewise returned undelivered. No notice was sent to either First Federal or Auburn National Bank. Notice of the impending lapse of the minimum redemption period was not required to be sent to mortgagees under Ind. Code § 6-1.1-25-6 (1981).[3]

On August 15, 1984, the Marion County Auditor executed and delivered a deed to the respondent Gossett.

The trial court's findings included the following:

> 23. No notice of the tax sale or of the issuance of the tax deed was ever received by OSI, Inc. or its successor in interest, Francis M. Sanda.
>
> 24. Other than notice by publication, no notice was directed to and no notice was received by First Federal Savings and Loan Association, its corporate successor, the First Indiana Federal Savings Bank, or the Auburn National Bank of Auburn, which succeeded to its priority lien with respect to the real estate.
>
> 25. Neither Auburn National Bank nor First Indiana

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[3] Although since revised, the statute still requires no notice to mortgagees.

had actual or constructive notice of the tax sale, issuance of tax deed or termination of their redemption rights.

26. That it was the policy of First Federal Savings and Loan Association, when notified of an impending tax sale, to first compel the property owner to pay the taxes and, failing that, to pay the delinquent taxes itself and add said payment to the principal obligation.

27. That it was the policy of Auburn National Bank of Auburn, when notified of an impending tax sale, to first compel the property owner to pay the taxes and, failing that, to pay the delinquent taxes itself and add said payment to the principal obligation.

28. That it was the policy in 1984 for the Marion County Auditors office to search the records of the Marion County Recorder in order to determine whether any mortgages were being adversely affected by any proposed issuance of tax deed.

29. The Marion County Auditor's office, when it received the notice of tax sale and notice of issuance of tax deed back undelivered, did not make a further attempt to locate and notify the owners of the West Washington Street real estate or the mortgagees by:

a. Giving notice to or contacting Robert Wildman; or

b. Forwarding any notice to the address of the West Washington Street property; or

c. Making inquiry of the occupants of the subject real estate as to the whereabouts of the owner, or

d. Giving notice to the mortgagees of record, First Federal Savings and Loan Association of Indianapolis or its successor in interest, Auburn National Bank of Auburn, which latter mortgage was recorded June 29, 1984.

30. That First Federal Savings and Loan Association of Indianapolis and Auburn National Bank of Auburn were reasonably identifiable and could have received mail service of notice of the proceedings herein. (Appendix p. A-14-A-16)

The trial court concluded that Auburn National Bank was entitled to full subrogation of the rights of First Federal and further concluded:

> 4. Mortgagees have a constitutional right to actual notice, if reasonable under the circumstances, of state action affecting their property interests. (See *Mennonite Board of Missions v. Adams*, (1983) 103 S.Ct. 2706, 462 U.S. 791.)
>
> 5. The sale of property at a tax sale, and the issuance of a tax deed which forecloses the period of redemption, are significant state actions affecting the property interests of mortgagees. (See *Mennonite Board of Missions v. Adams*, *supra*)
>
> 6. The Marion County Auditor, in conducting the tax sale of the subject property, failed to give sufficient notice to First Federal Savings and Loan Association, and accordingly their rights cannot be foreclosed and the tax sale is void as against them, and their successor in interest Auburn National Bank of Auburn.
>
> 7. I.C. § 6-1.1-24-4.2, now repealed, did not render due process to mortgagees in that it impermissibly placed the burden of receiving notice on the person to be served rather than upon the person seeking the exercise of state power; further, it is inconsistent with the mortgagees' affirmative constitutional right to receive notice "reasonably calculated to apprise him of the pending tax sale". (See *Mennonite Board of Missions v. Adams*, supra)
>
> 8. The Marion County Auditor, in conducting the tax sale of the subject property, failed to give sufficient notice of O.S.I., Inc. in that the Auditor filed [sic] to forward the tax sale notice and the notice of issuance of tax deed to the address furnished to him for that purpose.
>
> 9. The Marion County Auditor, in conducting the tax sale of the subject property, failed to give sufficient notice to O.S.I., Inc. in that, upon receiving the return of certified mail, the Auditor failed to conduct a meaningful further investigation which would have revealed the whereabouts of O.S.I., Inc. The rights of O.S.I., Inc. (and

its successor in interest, Francis M. Sanda) cannot be foreclosed and the tax sale is void as against them. (Appendix, p. A-16-A-17)

The trial court's judgment set aside the tax deed and vested title in Sanda.

Upon respondent Gossett's appeal, the Court of Appeals of Indiana reversed, finding two issues which it raised *sua sponte* to be dispositive. The court held that Auburn National Bank lacked standing to assert the failure of notice of the initial tax sale, and that Auburn National Bank was not entitled to notice of the termination of its redemptive rights and its reversionary interest upon the issuance of the tax deed because such issuance did not constitute state action.

Petitioner's petition for rehearing to the Court of Appeals of Indiana and petition for transfer to the Supreme Court of Indiana were denied without opinion.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I.

THE HOLDING OF THE COURT OF APPEALS OF INDIANA THAT THE TERMINATION OF A MORTGAGEE'S REDEMPTIVE AND REVERSIONARY RIGHTS BY ISSUANCE OF A TAX DEED IS A SELF-EXECUTING STATUTE OF LIMITATIONS AND NOT STATE-ACTION (A) CONFLICTS WITH THIS COURT'S DEFINITION OF "STATE ACTION", AND (B) DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT, TO-WIT: WHETHER ACTUAL NOTICE OF THE TERMINATION OF A MORTGAGEE'S INTEREST IS REQUIRED.

This issue confronts directly the issue reserved in *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983). As noted there:

> This appeal also presents the question whether, before the County Auditor executes and delivers a deed to the tax-sale purchaser, the mortgagee is constitutionally entitled to notice of its right to redeem the property. Cf. *Griffin v. Griffin*, 327 U.S. 220, 229, 66 S.Ct. 556, 560-561, 90 L.Ed. 635 (1946). Because we conclude that the failure to give adequate notice of the tax-sale proceeding deprived appellant of due process of law, we need not reach this question. (462 U.S. at 800 n.6)

Before analyzing the nature of the denial of due process, it is vital to understand the Indiana tax sale procedure. The purchaser at a tax sale acquires only a lien in the real estate. Ind. Code § 6-1.1-24-9(b)(1981). Original owners and lienholders have the right to redeem the property at any time before a tax deed is issued. Ind. Code § 6-1.1-25-1 (1981). It is inaccurate to refer to a "two-year period of redemption." The period of redemption extends for a minimum of two years (Ind. Code § 6-1.1-25-4(a)(1981)) and continues until the tax sale purchaser tenders his certificate of sale and the County Auditor executes and delivers a deed to him. If the purchaser does not obtain a deed within four years from the date of sale, his lien terminates. Ind. Code §6-1.1-25-7(1981). Accordingly, if a deed is not applied for by a tax sale purchaser within four years of the sale, the rights of the owner and any mortgagees are restored to their priority as they existed before the tax sale, and the rights of the tax sale purchaser lapse. Although notice of the impending issuance of the tax deed, specifying redemption rights, is required to be sent to owners, (Ind. Code §6-1.1-25-6 (1981)), no such notice is directed to mortgagees.[4]

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[4] Other states have similar statutes in which notice of the issuance of tax deed which terminates redemptive rights is not required to be given to mortgagees. See Hawaii Rev. Stat. 246-56 (1985); N.H. Rev. Stat. Ann. § 80:38(a) (1970); Vt. Stat. Ann. tit.32 § 5261 (1981); V.I. Code Ann. tit.33 § 1057 (1961); Alaska Stat. § 29.45.440 (1985); N.Y. Real Property Tax Law § 1014 (McKinney 1972).

A. The Issuance of the Tax Deed Constitutes State Action.

The opinion of the Court of Appeals of Indiana herein relied entirely upon *Calhoun v. Jennings*, 512 N.E.2d 178 (Ind. 1987):

> Finally, Auburn had no right either to actual notice or notice by mail from the auditor of the proposed issuance of the tax deed. On this subject, our Supreme Court in *Calhoun* said
>
> > We view the two year period of redemption following a tax sale as analogous to the selfexecuting feature of the Indiana Mineral Lapse Act involved in *Texaco* [*Inc. v. Short* (1982), 454 U.S. 516, 102 S.Ct. 781, 70 L.Ed.2d 738]. *Mennonite* requires that actual notice be given to reasonably ascertainable parties of interest prior to the acquisition of a superior lien on the property by a tax sale purchaser. However, it would require an unwarranted expansion of *Mennonite* to conclude that the interested parties are entitled to notice of a lapse of the redemption. Following the expiration of the redemption period, the tax sale purchaser, upon tendering the tax sale certificate, is absolutely entitled to have a tax deed executed and delivered. Ind. Code § 6-1.1-25-4 . . . We hold that the due process clause of the Fourteenth Amendment does not require that actual notice be given of either the lapse of the redemption period or the subsequent issuance of the tax deed.
>
> Thus, Auburn was not entitled to such notice. (*Gossett v. Auburn National Bank of Auburn*, 514 N.E.2d 309, 313 (Ind.App. 1987)[5]

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[5] In its ruling in *Calhoun*, the Indiana Supreme Court implicitly overruled a well-reasoned opinion by the Indiana Court of Appeals, in which it was stated:

> The tax sale creates a lien against the property that may ripen into full ownership at some later time by the issuance of a tax deed. IC 6-1.1-25-4 requires no judicial proceeding, summary or otherwise,

(Footnote continued)

This holding is in direct conflict with the construction of *Texaco, Inc. v. Short*, 454 U.S. 516 (1982), rendered by this Court in *Tulsa Professional Collection Services, Inc. v. Pope*, ____ U.S. ____, 108 S.Ct. 1340 (1988). With regard to a "self-executing statute of limitations" this Court held in *Pope*:

> The State has no role to play beyond enactment of the limitations period. While this enactment obviously is state action, the State's limited involvement in the running of the time period generally falls short of constituting the type of state action required to implicate the protections of the Due Process Clause. (108 S.Ct. at 1345)

Under the analysis in *Pope*, the relevant inquiry as to whether state action exists is: What acts start the running of the time period? This Court held that the extensive involvement of the probate court in *Pope*, which enabled the time period to begin to run, was "so pervasive and substantial that it must be considered state action subject to the restrictions of the Fourteenth Amendment." 108 S.Ct. at 1346. The lapse of the claims period in *Pope* was held to be state action on the grounds that the state had acted in starting the claims period.

Similarly, under the Indiana tax sale procedure, there is state action in starting the redemption period. The County Auditor declares the tax delinquency. Ind. Code § 6-1.1-24-1 (1981). The County Auditor issues the notices. Ind. Code § 6-1.1-24-3 (1981) and Ind. Code § 6-1.1-24-4 (1981). The County Treasurer conducts the sale. Ind. Code § 6-1.1-24-5 (1981). The County Treasurer issues a receipt upon payment of the bid and the County Auditor issues the certificate of sale. Ind. Code § 6-1.1-24-9 (1981). The certificate of sale begins the running of the period of redemption.

Footnote 5 continued

before the issuance of the tax deed cuts off the prior owner's interest in the property. In lieu of such a proceeding, IC 6-1.1-25-1 provides that those with an interest in the property may redeem it at any time before a tax deed is issued. Given the untoward result of a failure to redeem, notice to interested parties of the right to redeem is required as an element of due process. (Fields v. Evans, 480 N.E.2d 575 (Ind.App. 1985) opinion on rehearing 484 N.E.2d 36, 38 (1985)).

State action was present in the events that began the period of redemption and therefore, the lapse of that period under *Pope* is state action subject to the due process right guaranteed in the Fourteenth Amendment to the United States Constitution.

It should be noted that, under the analysis expressed in the dissent of Chief Justice Rehnquist in *Pope*, the Indiana tax sale procedure would not be self-executing. Under Justice Rehnquist's analysis, the relevant inquiry would be whether the action which *ends* the period of redemption is state action. In the case at bar, the issuance of the tax deed by the Auditor is the action which itself extinguishes the claimant's rights, terminating the redemption period and eliminating the reversion which would otherwise take place four years after the tax sale. Indeed, the existence of the reversion right illustrates the impropriety of the use of the term "self-executing." If there were no state action in the form of an issuance of a tax deed, the *status quo ante* would be restored.

The conflict between the Indiana Supreme Court's interpretation of *Texaco, Inc. v. Short* and this Court's delineation in *Tulsa Professional Collection Services, Inc. v. Pope* is clear.[6] Once state action is found, the other elements of deprivation of due process are likewise evident.

B. The Mortgagee Has A Legally Protected Property Interest Which Is Significantly Affected By The Issuance Of The Tax Deed.

As noted in *Mennonite*, the mortgagee has a legally protected property interest. *Mennonite Board of Missions v. Adams*, 462 U.S. at 798. The tax sale diminishes the value of his property interest by giving a priority lien to the tax sale purchaser. However, the issuance of the tax deed completely eliminates the mortgagee's interest. In the case at bar, the tax sale placed a Six Thousand Two Hundred Thirteen Dollar and

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[6] The Indiana Supreme Court's doctrine is also in conflict with *Wylie v. Patton*, 111 Idaho 52, 720 P.2d 649 (Idaho Ct. App. 1986).

Seventy-One Cents ($6,213.71) lien ahead of the First Federal mortgage and the Auburn National Bank mortgage which took its place. The issuance of the tax deed, however, wiped out the remainder of Auburn National Bank's Two Hundred Thousand Dollar ($200,000.00) mortgage. This nullification of the mortgagee's security interest is obviously a significant effect sufficient to require actual notice.

C. The Termination Of Redemptive And Reversionary Interests By The Issuance Of The Tax Deed Is Not Merely A Confirmation Of Rights Previously Existing.

This Court in *Mennonite*, at note 6 (462 U.S. 800) noted the possible application of *Griffin v. Griffin*, 327 U.S. 220 (1946) in determining whether due process notice was required where notice had been given at an earlier stage of the proceeding. *Griffin* does not enable the State of Indiana to avoid giving notice of the issuance of tax deed for the following reasons:

1. Griffin states: "Due process does not require that notice be given before confirmation of rights theretofore established in a proceeding of which adequate notice was given." 327 U.S. 233-234. This presupposes adequate notice of the first proceeding. In the case at bar, no adequate notice was ever given to any owner or mortgagee. Under Ind. Code § 6-1.1-24-4.2 (1981), as it then existed, no notice was required to be given to mortgagees.

2. The notice that was sent to, but not received by, the owner made no mention of redemptive rights at all (See, *supra*, p. 4.) I.C. § 6-1.1-24-4 (1981) does not require any disclosure of redemptive rights or the termination thereof. Thus, even had such a notice been sent and received, it is not reasonably calculated to inform the mortgagee of the rights which would be terminated.

3. Finally, the holding of this Court in *Griffin* was that to the extent the later judgment depended on facts occurring after the prior judgment, or foreclosed defenses which would have

been available after the prior judgment, then the later *ex parte* proceeding must be set aside. Inasmuch as the termination of Auburn National Bank's right of redemption was contingent upon the owner not having redeemed following the issuance of the tax certificate, it cannot be said that the issuance of the tax deed was merely a confirmation of rights established in a prior proceeding of which adequate notice was given. The dire consequence to the mortgagee, balanced against the minimal burden on the county to provide mailed notice to a record mortgagee, surely mandates that actual notice be given.

The Indiana Court of Appeals erred in concluding that no notice was required of the termination of redemption and reversionary rights. Because similar statutes are found in other states, this Court should directly address the issue.

II.

THE HOLDING OF THE INDIANA COURT OF APPEALS THAT THE PETITIONER LACKED STANDING CONFLICTS WITH THE APPLICABLE DECISIONS OF THIS COURT, AND ON THE MERITS PETITIONER WAS DENIED DUE PROCESS OF THE LAW AS A RESULT OF THE STATE'S FAILURE TO PROVIDE PROPER NOTICE OF THE TAX SALE TO MORTGAGEES OF RECORD.

A. Auburn National Bank Has Standing To Assert The Failure Of Notice Of The Tax Sale.

This Court has established the elements of standing:

> Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing. It is, of course, a question of federal law. (*Baker v. Carr*, 369 U.S. 186, 204 (1961))

In order to establish this standing, petitioner must show a "distinct and palpable injury" and a "'fairly traceable' causal connection between the claimed injury and the challenged conduct." *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 72 (1978). The latter element has been restated as whether the party has shown an injury that is "likely to be redressed by a favorable decision." *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976). The evidence in this case, and the findings of the trial court, clearly demonstrate that notice to First Federal prior to or at the time of the tax sale would have led to a payment of the taxes. Had this happened, Auburn National Bank would have received the first mortgage rights it intended to obtain when it paid off the First Federal mortgage. Questions of redemption would never have arisen.

The Court of Appeals of Idaho was faced with a similar situation in *Wylie v. Patton*, 111 Idaho 52, 720 P.2d 649 (Idaho Ct. App. 1986). There, the mortgagee[7] recorded his interest on the same day that the County Treasurer sent notice of the anticipated issuance of a tax deed. Citing *Mennonite*, the Idaho Court of Appeals reversed a trial court holding that the mortgagee had no standing.

B. Ind. Code § 6-1.1-24-4.2 Impermissibly Placed The Burden Of Receiving Notice On The Mortgagee.

Once the standing issue is clarified, the complete failure of notice of the tax sale becomes relevant.

Apparently as a response to the lower court proceedings in *Mennonite*, the Indiana General Assembly in 1981 provided for conditional notice to mortgagees who annually requested notice as to each property in which they had an interest. Ind. Code § 6-1.1-24-4.2 (1981)

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[7] Appellant Patton was in fact a beneficiary of a deed of trust, but was treated in the opinion as a mortgagee.

Similar modifications have been attempted in other states. They have usually been found to be constitutionally infirm. See, e.g. *Wylie v. Patton, supra.*; *In the Matter of the Foreclosure of Tax Liens by the County of Erie*, 481 N.Y.S. 2d 547 (N.Y.Sup. 1985); *Application of Tref Realty*, 491 N.Y.S. 2d 947 (N.Y.Sup. 1985); *United States v. Malinka*, 685 P.2d 405 (Okla.App. 1984); *Town of Phillipsburg v. Block 22, Lots 14, 15, 16*, 528 A.2d 98 (N.J. Super. 1987); *Seattle-First National Bank. v. Umatilla County*, 77 Or.App. 283, 713 P.2d 33 (1986), *rev. den.*, 300 Or. 704, 716 P.2d 758 (1986).

This Court, in *Mennonite*, did not address the amendment to Ind. Code § 6-1.1-24-4.2 (462 U.S. at 793 n.2) inasmuch as the amendment took place after the relevant proceedings in *Mennonite*. However, the language of Justice Marshall clearly points out the proper path:

> Personal service or mailed notice is required even though sophisticated creditors have means at their disposal to discover whether property taxes have not been paid and whether tax sale proceedings are therefore likely to be initiated. In the first place, a mortgage need not involve a complex commercial transaction among knowledgeable parties, and it may well be the least sophisticated creditor whose security interest is threatened by a tax sale. *More importantly, a party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation.* [emphasis supplied]
>
> . . .
>
> But it does not follow that the State may forgo even the relatively modest administrative burden of providing notice by mail to parties who are particularly resourceful. Cf. *New York City v. New York, N.H. & H.R. Co.*, 344 U.S., at 297, 73 S.Ct. at 301. Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable. Furthermore, a mortgagee's knowledge of delin-

> quency in the payment of taxes is not equivalent to notice that a tax sale is pending. The latter "was the information which the [county] was constitutionally obliged ... to give personally to the appellant-an obligation which the mailing of a single letter would have discharged." *Schroeder v. New York City*, 371 U.S., at 214, 83 S.Ct., at 283. (462 U.S. 799-800) (Footnote omitted)

The onus was on the State of Indiana to provide notice to the mortgagees of record. The burden was a simple one and should not legislatively be shifted to a party whose rights are threatened. The reoccurrence of this issue as illustrated by the cases from other jurisdictions illustrates that the conflict will continue until the issue is directly addressed by this Court.

CONCLUSION

For all the foregoing reasons, this Court must not allow the decision below to remain as precedent, and Petitioner respectfully prays that this petition for a Writ of Certiorari to the Court of Appeals of Indiana be granted.

Respectfully submitted,

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APPENDIX

IN THE
COURT OF APPEALS OF INDIANA
FOURTH DISTRICT

ED GOSSETT,	)	
	)	
Appellant (Defendant Below),	)	
	)	
-v-	)	No. 49A04-8612-
	)	CV-00379
AUBURN NATIONAL BANK OF AUBURN, FRANCIS M. SANDA,	)	
	)	
	)	
Appellees (Plaintiffs Below).	)	

APPEAL FROM THE MARION SUPERIOR COURT, ROOM NO. TWO
The Honorable Kenneth H. Johnson
Cause No. S284-1409

CONOVER, J.

Defendant-Appellant Ed Gossett (Gossett) appeals the trial court's judgment divesting him of the interest he acquired in certain real estate by way of a tax sale.

We reverse.

ISSUES

Because we reverse, we address only the following dispositive issues which we raise *sua sponte:*

1. whether Auburn National Bank (Auburn) lacks "standing" to argue Ind. Code § 6-1.1-24-4.2 violated First Federal Savings and Loan Association's (First Federal) Fourteenth Amendment due process right to receive notice "reasonably calculated to apprise" it of a pending tax sale of real estate upon which it held a mortgage, and

2. whether Auburn was entitled to notice of proposed issuance of the tax deed.

FACTS

O.S.I., Inc. (OSI) was an Indiana corporation. The subject real estate, commonly known as 6415 West Washington Street, Indianapolis, Marion County, Indiana (6415), was one of several properties OSI acquired in Indiana upon which Omelette Shop restaurants were located. OSI acquired title to 6415 by warranty deed dated September 1, 1977, recorded September 14, 1977, in the office of the Recorder of Marion County (recorder).

Ken Sexton (Sexton), a vice president of OSI, was hired in 1977 to oversee OSI's business interests in Indiana. His duties included paying the property taxes assessed on OSI's various parcels of Indiana real estate, including 6415. Sexton was terminated by OSI in December, 1981. Since then, two other persons have been responsible therefor. However, OSI never paid any of the real estate taxes assessed against 6415 from the time OSI acquired it in 1977 until it was sold to Gossett at the tax sale in 1982.

On February 20, 1978, OSI executed a mortgage on 6415 to secure a loan made to it by First Federal. This mortgage was recorded the following day, February 21, 1978, in the recorder's office. Francis Sanda (Sanda), an officer and shareholder of OSI, was guarantor of the loan secured by this mortgage.

Since 1979, the township assessors of Marion County have kept copies of the deeds filed for record and the real estate transfer books, rather than the Marion County Auditor (auditor).[1] These assessors first value the parcels for tax pur-

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[1] IC 6-1.1-5-9 provides

> For all civil townships in which a consolidated first class city [Indianapolis in this case] is situated, the township assessor has the duties and authority described in sections 1 through 8 of this chapter. These duties and authority include effecting the transfer of title to real property and preparing, maintaining, approving, correcting, indexing, and publish-

(Footnote continued)

poses, assign a parcel number to each piece of real estate, keep records of the property owners in their townships and the addresses to which the property owners request that tax notices be sent, and of any requests to change the mailing addresses for tax purposes. (R. 474-5). These parcel numbers, names, and mailing addresses are then put into the Marion County computerized property system. Only the township assessor may change the tax mailing address, the auditor is not empowered to do so. (R. 507).

The handwritten notation appearing on the deed conveying 6415 to OSI is

> Tax statement: c/o Robert T. Wildman
> 2450 1 Indiana Sq.

according to the Wayne Township assessor's records. (R. 473). 6415 is located in Wayne Township. Wildman was an Indianapolis attorney who represented OSI sporadically during its corporate existence.

Because OSI was delinquent in paying the taxes assessed on 6415, the auditor on June 25, 1982, mailed notices of proposed tax sale of the property by certified mail to:

(Footnote 1 continued)

> ing the list or record of, or description of title to, real property. If a court renders a judgment for the partition or transfer of real property located in one (1) of these townships, the clerk of the court shall deliver the transcript to the township assessor.

and IC 6-1.1-5-4 provides

> Except as provided in section 9 of this chapter, the county auditor shall keep a transfer book, arranged by townships, cities, and towns. In the transfer book he shall enter a description, for the purpose of taxation, of land that is conveyed by deed or partition, the date of the conveyance, the names of the parties, and the postoffice address of the grantee. In addition, the auditor, except as provided in section 9 of this chapter, shall endorse on the deed or instrument of conveyance the words "duly entered for taxation", "not taxable", or "has already been listed for taxation".

OSI Inc
c/o KEN SEXTON
SUITE G
920 N SHADELAND AVE
INDIANAPOLIS IN 46219

(R. 488). The notices were returned to the auditor's office undelivered and marked "not deliverable as addressed — unable to forward." No notice of the proposed 1982 tax sale was ever mailed to First Federal by the auditor. First Federal never filed a request with the auditor to be mailed a copy of any notice of a proposed tax sale of 6415 as authorized by IC 6-1.1-24-4.2,[2] the statute in force at that time.

At the sale, 6415 was sold to Gossett who paid $6,213.71 for it on August 10, 1982. That sum represented the total amount assessed against it for taxes and sewage service to the date of the sale. The auditor's office issued Gossett a certificate of sale.

In 1984, OSI was liquidated. It conveyed title to 6415 to Sanda by quitclaim deed as Sanda's share of the liquidation distribution. At the same time, Auburn loaned Sanda $200,000

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[2] IC 6-1.1-24-4.2 at that time read

> (a) In addition to the notice required by sections 3 and 4 of this chapter, the county auditor shall send a notice of sale to any mortgagee of real property which is subject to sale under the provisions of this chapter, if the mortgagee, annually, on a form prescribed by the state board of accounts, has:
>
> (1) requested that notice of a sale of the real property be sent to him; and
>
> (2) agreed to pay a fee to the county auditor, to cover the cost of sending notice.
>
> The county council shall set the annual fee referred to in clause (2) of this section. However the fee may not exceed ten dollars ($10), for each separate parcel as carried on the tax records.
>
> (b) The county auditor shall send the notice of sale to the mortgagee's last known address by certified mail. The county auditor shall prepare the notice in the form prescribed by the state board of accounts, and he shall mail the notice at least twenty-one (21) days before the date of sale.

which was secured by a mortgage on 6415. As a condition of that loan, all existing liens and encumbrances, including the First Federal mortgage, were to have been fully paid from the loan's proceeds so that Auburn's mortgage would be a first lien on the property. That deed and mortgage were recorded on June 29, 1984, in the recorder's office. However, Gossett's tax sale lien, superior to all other liens against 6415 under IC 6-1.1-24-9(b), was never paid by either Auburn or Sanda.

On the same day, June 29, 1984, the auditor's office mailed a Notice of Tax Sale Redemption or Issuance of Deed by certified mail to the same address it had sent the tax sale notices. This notice was also returned undelivered marked, "moved, not forwardable — forwarding order expired."

When a deed notice is returned, the auditor first checks to determine if the address to which the notice was mailed is the current one in the property system. If so, the phone book, the criss-cross, the computer system, and the property system are all checked to determine if that address is the current one. If no reason can be found to re-mail that notice, it is placed in the auditor's file, as was done in this case. (R. 515-16). Finally, prior to deeding a property sold at tax sale, the auditor prepares an information sheet bearing the titleholder's name and the parcel number involved and forwards a copy of that sheet to the recorder's office where the parcel is checked for lienholders and mortgagees of record. (R. 506, 508). As to 6415, that procedure was followed. Nothing was found in the recorder's office as to lienholders and mortgagees, and the auditor's records reveal no mortgage holders had filed a request asking to be notified if 6415 had delinquent taxes, was put for tax sale, or went up for tax deed. (R. 511-12).

On August 15, 1984, the auditor's office executed and delivered a deed to 6415 to Gossett. This deed was recorded August 30, 1984, in the recorder's office. 6415 at that time was valued at $200,000.

Auburn thereafter commenced this litigation by filing a complaint to set aside the tax deed issued to Gossett and to have

title to the subject real estate quieted in Sanda, its mortgagor. It named Sanda and Gossett as co-defendants. Both Sanda and Gossett then counterclaimed, each to quiet title in himself. The trial court, after a bench trial, divested Gossett of his interest in the subject real estate, and quieted title in Sanda.

Neither OSI, First Federal nor Auburn had actual notice of the tax sale proceeding or the pending issuance of the tax deed to Gossett.

Gossett appeals.

DISCUSSION AND DECISION

I. Standard of Review

The trial court entered findings of fact and conclusions of law pursuant to a request made under Ind. Rules of Procedure, Trial Rule 52(A). The reason for the entry of findings is to provide the parties and reviewing court with the theory upon which the trial judge decided the case so the right of review for error is effectively perserved. *Zalud v. Ethan Associates* (1981), Ind. App., 418 N.E.2d 309, 312.

Where findings are entered by the trial court, they must be sufficient to disclose a valid basis for the legal result reached in the judgment. *Town of Rome City v. King* (1983), Ind. App., 450 N.E.2d 72, 77. On appeal, we will not set aside the trial court's findings or judgment unless clearly erroneous. Trial Rule 52(A). A finding is clearly erroneous when the evidence contains no facts or reasonable inferences supporting the findings. *Wiseman v. Wolfe's Terre Haute Auto* (1984), Ind. App., 459 N.E.2d 736, 737, *reh. denied.* Where the evidence is conflicting, we will give deference to the trial court's decision. *Rome City, supra*, at 77.

However, the trial court cannot ignore competent, uncontroverted evidence. *Steenhover v. College Life Ins. Co.* (1984), Ind. App., 458 N.E.2d 661, 666, fn. 13. We consider such evidence as true on appeal when it bears upon a material fact which is necessary to the decision but does not appear in the lower court's findings. The trial court should find all material or

controlling facts within the issues of the case when there is credible evidence on the subject. *Indiana State Personnel Board v. Jackson* (1963), 244 Ind. 321, 192 N.E.2d 740, 744. A judgment is clearly erroneous when it leaves us with a firm and definite conviction a mistake has been made. *Rome City, supra*, at 77.

II. Auburn's "Standing" to Argue Due Process Tax Sale Notice Issue

Auburn argues because it is entitled to full subrogation of First Federal's rights, including notice of a proposed tax sale, the tax sale of 6415 is void as to First Federal and Auburn because the auditor failed to notify First Federal thereof other than by notice by publication in violation of First Federal's Fourteenth Amendment right to due process of law.

This case is controlled by our Supreme Court's recent decision in *Calhoun v. Jennings, Auditor* (1987), Ind., slip op. No. 29S02-8607-CV-652, a case substantially on all fours with the one we here consider but with one difference. In *Calhoun*, the appellant specifically raised the issue of whether the post tax sale mortgagee had standing to assert Fourteenth Amendment unconstitutionality of IC 6-1.1-24-4.2 because it violated the pre-tax sale mortgagee's right to due process. In the case before us, however, Gossett did not raise that issue either below or on appeal. Regardless, we must do so *sua sponte* because "standing" in such cases is a jurisdictional question. *Board of Commissioners v. Kokomo City Plan Commission* (1975), 263 Ind. 282, 330 N.E.2d 92, 95-96.

Absent a case or controversy, courts are without jurisdiction to proceed. *Calhoun, id.*, slip op. at 7-8; *City of Indianapolis v. Indiana State Board of Tax Commissioners* (1974), 261 Ind. 635, 308 N.E.2d 868, 869-70. Courts have no power to determine questions of law without proper complainants before them. "Standing" is a restraint upon a court's exercise of its jurisdiction, in that it cannot proceed where there is no demonstrable injury to the complainant before it. *Calhoun* and *City of Indianapolis, Id.* Auburn, the mortgagee who acquired its

mortgage interest in 6415 after it had been sold at tax sale, has no "standing" to litigate the constitutionality of IC 6-1.1-24-4.2 vis-a-vis First Federal's Fourteenth Amendment due process right to notice by mail under *Mennonite Board of Missions v. Adams*, (1983), 462 U.S. 791, 103 S.Ct. 2706, because Auburn, the post-tax sale mortgagee, cannot demonstrate any direct pecuniary loss caused by the operation of that allegedly unconstitutional statute. *Calhoun*, slip op. at 8. Because Auburn has no "standing" to argue that issue, we cannot consider it.

III. Tax Deed Notice

Finally, Auburn had no right either to actual notice or notice by mail from the auditor of the proposed issuance of the tax deed. On this subject, our Supreme Court in *Calhoun* said

> We view the two year period of redemption following a tax sale as analogous to the self-executing feature of the Indiana Mineral Lapse Act involved in *Texaco*. *Mennonite* requires that actual notice be given to reasonably ascertainable parties of interest prior to the acquisition of a superior lien on the property by a tax sale purchaser. However, it would require an unwarranted expansion of *Mennonite* to conclude that the interested parties are entitled to notice of a lapse of the redemption. Following the expiration of the redemption period, the tax sale purchaser, upon tendering the tax sale certificate, is absolutely entitled to have a tax deed executed and delivered. Ind. Code § 6-1.1-25-4 . . . We hold that the due process clause of the Fourteenth Amendment does not require that actual notice be given of either the lapse of the redemption period or the subsequent issuance of the tax deed.

Thus, Auburn was not entitled to such notice.

IV. Title Quieted in Gossett

Sanda has filed no brief in this appeal in defense of his claimed title to the 6415 real estate. Under the facts before us, we must set aside the trial court's judgment quieting title in Sanda.

Gossett is the grantee named in the auditor's tax deed. It was delivered to him as holder of the tax certificate the auditor had issued him two years earlier under IC 6-1.1-24-9 as the highest bidder at 6415's tax sale. Sanda claims title under OSI's quitclaim deed to 6415 given him as his share of its assets upon OSI's liquidation.

The parties to this appeal have not demonstrated any irregularities in the tax sale proceedings which render them void, nor have we found any. The tax certificate was duly issued and the property was never redeemed by payment of Gossett's due under IC 6-1.1-25-2 during the two years Gossett held it. Gossett's tax deed was duly and timely issued thereafter. IC 6-1.1-25-4 provides in relevant part

. . .

> (d) A tax deed executed under this section vests in the grantee an estate in fee simple absolute, free and clear of all liens and encumbrances . . . .

Thus, Sanda's title was divested upon issuance of Gossett's tax deed. Accordingly, Gossett owns the fee simple absolute title to 6415, free and clear of all liens and encumbrances, including Auburn's mortgage thereon. The trial court's judgment quieting title in Sanda was improvidently issued.

The judgment is reversed and remanded with instructions to vacate the judgment quieting title in Sanda and enter judgment quieting title in Gossett. Costs versus Auburn.

MILLER, P.J. concurs.
SHIELDS, P.J. concurs

> I, Dan Heiser, Clerk of the Supreme Court and Indiana Court of Appeals do hereby certify that the above and foregoing is a full true, complete and correct copy of the original opinion as the same appears upon the record of said court, and in my custody as Clerk.

In testimony Whereof I have hereunto subscribed my name and affixed the Seal of said Court this 29th day of August, 1988.

/s/ _____
Dan Heiser, Clerk

By /s/ _____
N. Pickerton, Deputy.

STATE OF INDIANA	)	IN THE MARION
	)	SUPERIOR COURT
	)	SS: CIVIL DIVISION
COUNTY OF MARION	)	CAUSE NUMBER
	)	S284-1409

AUBURN NATIONAL BANK OF AUBURN,	)	
A National Banking Association,	)	
	)	
Plaintiff,	)	Filed
	)	October 9, 1986
v.	)	
	)	Bernard J. Gohmann, Jr.
FRANCIS M. SANDA and	)	
EDWARD GOSSETT,	)	
	)	
Defendants.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

This cause came on for trial on the 12th day of June, 1986 on the Complaint to Set Aside Tax Deed and Quiet Title of Real Estate filed by the Plaintiff, the Cross-Claim filed by Defendant Francis M. Sanda and the Counter-Claim filed by Defendant Ed Gossett. The parties agreed prior to the hearing that all questions as to damages would be reserved pending the determination of the validity of the tax sale. The Court having heard the evidence and considered the stipulations and exhibits of the parties, and the Plaintiff Auburn National Bank of Auburn and the Defendant Ed Gossett having filed Requests on June 12, 1986 for Special Findings, therefore finds the facts as follows:

1. Prior to August 10, 1982, OSI, Inc., an Indiana corporation, owned the real estate commonly known as 6415 West Washington Street, Indianapolis, Indiana. (See Plaintiff's Exhibit "17")

2. OSI, Inc. also owned other parcels of real estate, all of which had erected on them Omelette Shop restaurants.

3. OSI, Inc. owned Omelette Shop restaurants located at 21st and Shadeland in Indianapolis and 38th and Shadeland in Indianapolis. No restaurant was owned at 920 North Shadeland Avenue.

4. Prior to August 10, 1982, First Federal Savings and Loan Association of Indianapolis held a mortgage on said West Washington Street real estate by virtue of a certain mortgage recorded as Instrument Number 78-9152 in the Office of the Recorder of Marion County, Indiana.

5. Defendant Francis M. Sanda was an officer and shareholder in OSI, Inc., and was personally liable as a guarantor on the mortgage to First Federal Savings and Loan Association.

6. OSI, Inc. had directed the Marion County Auditor, by virtue of the tax address listed on the original warranty deed, to send tax notices and information to Robert Wildman, 2450 One Indiana Square.

7. The real estate taxes due on the West Washington Street real estate became delinquent.

8. The Marion County Auditor sent notices of the proposed tax sale to OSI, Inc. at 920 North Shadeland Avenue, Indianapolis, Indiana by notice dated June 25, 1982 although said Auditor has no record showing that tax notices should be sent to that address.

9. The notices of tax sale were returned to the Office of the Auditor of Marion County undelivered and maked "Not deliverable as addressed — unable to forward" by the U.S. Post Office. (See Plaintiff's Exhibit "12" and "13")

10. Defendant, Ed Gossett, claims his interest by reason of

a tax deed executed by the Auditor of Marion County on August 15, 1984 pursuant to a tax sale held on the 10th day of August, 1982.

11. The Marion County Auditor sent the notice of the issuance of the tax deed to OSI, Inc. at 920 North Shadeland Avenue, Indianapolis, Indiana by notice dated June 29, 1984. This is the same address to which notice of the tax sale was sent and was returned to the Auditor two years prior hereto as "Not deliverable as addressed".

12. The notice of issuance of tax deed directed to OSI, Inc. was returned to the office of the Auditor of Marion County undelivered and marked "Moved, not forwardable — forwarding order expired" by the U.S. Post Office. (See Plaintiff's Exhibits "15" and "16").

13. On June 29, 1984, Francis M. Sanda received title to the real estate from OSI, Inc. by virtue of a certain deed recorded as Instrument Number 84-49650 in the Office of the Recorder of Marion County. (See Plaintiff's Exhibit "6A")

14. The conveyance of the West Washington Street real estate to Francis M. Sanda was a liquidation distribution to Francis M. Sanda of his interest in OSI, Inc.

15. At the time of the issuance of the tax deed, the West Washington Street real estate was valued at Two Hundred Thousand Dollars ($200,000.00).

16. The Defendant, Ed Gossett, paid Six Thousand Two Hundred Thirteen Dollars Seventy-One Cents ($6,213.71) at the tax sale in order to acquire the West Washington Street property.

17. Prior to the purchase of the West Washington Street real estate by Francis M. Sanda, the Plaintiff, Auburn National Bank, advanced the sum of Two Hundred Thousand Dollars ($200,000.00), which was to be secured by a new mortgage on the West Washington Street real estate, and which sum was advanced with the understanding that all existing liens and encumbrances, including specifically the prior mortgage of

First Federal Savings and Loan Association of Indianapolis would be satisified out of the proceeds and the new mortgage would be the first mortgage on the West Washington Street real estate.

18. That the loan proceeds from Auburn National Bank were forwarded in escrow to the attorney conducting the closing of the real estate transfer and the liquidation of OSI, Inc., for the purpose of paying off the First Federal loan and other debts of OSI, Inc.

19. The First Federal loan was entirely satisfied out of the proceeds of the Auburn National Bank loan.

20. During the period of 1982 through August of 1984, the West Washington Street real estate was occupied by lessees of OSI, Inc. and Francis M. Sanda. The Defendant Francis M. Sanda required that the Auburn National Bank of Auburn loan proceeds be used to pay off the First Federal mortgage in order to protect his new individual interest in the property and in order to satisfy his personal liability on the First Federal Mortgage Note.

21. The new mortgage of Auburn National Bank of Auburn was duly executed and, was recorded on June 29, 1984 as Instrument Number 84-49651 in the Office of the Recorder of Marion County, Indiana. (See Plaintiff's Exhibit "4")

22. The First Federal Mortgage was released by an instrument recorded as Instrument Number 84-55260 in the Office of the Recorder of Marion County, Indiana. (See Plaintiff's Exhibit "3")

23. No notice of the tax sale or of the issuance of the tax deed was ever received by OSI, Inc. or its successor in interest, Francis M. Sanda.

24. Other than notice by publication, no notice was directed to and no notice was received by First Federal Savings and Loan Association, its corporate successor, the First Indiana Federal Savings Bank, or the Auburn National Bank of Auburn, which succeeded to its priority lien with respect to the real estate.

25. Neither Auburn National Bank nor First Indiana had actual or constructive notice of the tax sale, issuance of tax deed or termination of their redemption rights.

26. That it was the policy of First Federal Savings and Loan Association, when notified of an impending tax sale, to first compel the property owner to pay the taxes and, failing that, to pay the delinquent taxes itself and add said payment to the principal obligation.

27. That it was the policy of Auburn National Bank of Auburn, when notified of an impending tax sale, to first compel the property owner to pay the taxes and, failing that, to pay the delinquent taxes itself and add said payment to the principal obligation.

28. That it was the policy in 1984 for the Marion County Auditors office to search the records of the Marion County Recorder in order to determine whether any mortgages were being adversely affected by any proposed issuance of tax deed.

29. The Marion County Auditor's office, when it received the notice of tax sale and notice of issuance of tax deed back undelivered, did not make a further attempt to locate and notify the owners of the West Washington Street real estate or the mortgagees by:

a. Giving notice to or contacting Robert Wildman; or

b. Forwarding any notice to the address of the West Washington Street property; or

c. Making inquiry of the occupants of the subject real estate as to the whereabouts of the owner, or

d. Giving notice to the mortgagees of record, First Federal Savings and Loan Association of Indianapolis or its successor in interest, Auburn National Bank of Auburn, which latter mortgage was recorded June 29, 1984.

30. That First Federal Savings and Loan Association of Indianapolis and Auburn National Bank of Auburn were rea-

sonably identifiable and could have received mail service of notice of the proceedings herein.

CONCLUSIONS OF LAW

1. It is not contested that neither the owners nor the mortgagees received actual notice of the tax sale, thus the real issue in this cause is the adequacy of constructive notice. (See Gossett Brief at page 2). I.C. § 6-1.1-25-16 provides in pertinent part:

> "Proof required to defeat tax deed. — A person may defeat the title conveyed by a tax deed executed under section 4 [6-1.1-25-4] of this chapter only by proving: . . .
>
> (7) If the original owner is claiming adversely to the deed, that the notices required by I.C. § 6-1.1-24-4 and section 6 [6-1.1-25-6] of this chapter were not given in the manner prescribed in those sections."

2. Under the doctrine of equitable subrogation, Auburn National Bank is entitled to full subrogation of the rights of First Federal Savings and Loan Association.

3. Under the doctrine of equitable subrogation, Francis M. Sanda is entitled to be subrogated to the rights of First Federal Savings and Loan Association.

4. Mortgagees have a constitutional right to actual notice, if reasonable under the circumstances, of state action affecting their property interests. (See *Mennonite Board of Missions v. Adams*, (1983) 103 S.Ct. 2706, 462 U.S. 791.)

5. The sale of property at a tax sale, and the issuance of a tax deed which forecloses the period of redemption, are significant state actions affecting the property interests of mortgagees. (See *Mennonite Board of Missions v. Adams*, supra)

6. The Marion County Auditor, in conducting the tax sale of the subject property, failed to give sufficient notice to First Federal Savings and Loan Association, and accordingly their rights cannot be foreclosed and the tax sale is void as against them, and their successor in interest Auburn National Bank of Auburn.

7. I.C. § 6-1.1-24-4.2, now repealed, did not render due process to mortgagees in that it impermissibly placed the burden of receiving notice on the person to be served rather than upon the person seeking the exercise of state power; further, it is inconsistent with the mortgagees' affirmative constitutional right to receive notice "reasonably calculated to apprise him of the pending tax sale". (See *Mennonite Board of Missions v. Adams*, supra)

8. The Marion County Auditor, in conducting the tax sale of the subject property, failed to give sufficient notice of O.S.I., Inc. in that the Auditor filed to forward the tax sale notice and the notice of issuance of tax deed to the address furnished to him for that purpose.

9. The Marion County Auditor, in conducting the tax sale of the subject property, failed to give sufficient notice to O.S.I., Inc., in that, upon receiving the return of certified mail, the Auditor failed to conduct a meaningful further investigation which would have revealed the whereabouts of O.S.I., Inc. The rights of O.S.I., Inc. (and its successor in interest, Francis M. Sanda) cannot be foreclosed and the tax sale is void as against them.

JUDGMENT

IT IS NOW ORDERED, ADJUDGED AND DECREED by the Court that the tax sale and the deed issued thereunder were and are invalid, and pursuant to Trial Rule 70(A), title to the following described real estate:

> Part of the Northwest Quarter of Section 14, Township 15 North, Range 2 East, Marion County, Indiana, to-wit:
>
> Beginning at a point which is 992.91 feet North and 557.40 feet West of the Southeast corner thereof, said point being measured along the section bearing; thence South 68 degrees 39 minutes West 105.00 feet; thence North zero degrees East 281.92 feet to a point in the center of U.S. Route #40; thence North 68 degrees and 39 minutes East along said center line 108.00 feet; thence South 34.8 minutes West 283.00 feet to the place of beginning.

is hereby vested and title quieted in Francis M. Sanda and the interest of Ed Gossett therein is wholly divested.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this matter is set for hearing as a second choice setting, January 5, 1987 at 9:00 a.m. and as a first choice setting on April 6, 1987 at 9:00 a.m. on the remaining issues of:

1. The amount of reimbursement to which Defendant Ed Gossett is entitled pursuant to statute.

2. The amount, if any, to which Defendant Francis M. Sanda is entitled by way of damages from Defendant Ed Gossett.

3. Whether Defendant Ed Gossett is liable for attorney fees to Auburn National Bank of Auburn, and if so, in which amount.

ALL OF WHICH IS ORDERED AND ADJUDGED at Indianapolis, Indiana this 9th day of October, 1986.

DATED: October 9, 1986 /s/ _____

Judge Kenneth H. Johnson
Marion Superior Court
Civil Division, Room 2

DISTRIBUTION:

Mr. Steven J. Moss
COOTS HENKE & WHEELER
255 East Carmel Drive
Carmel, Indiana 46032

Mr. J. Brian Niederhauser
HARRISON & MOBERLY
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Indianapolis, Indiana 46204

Mr. James M. Secrest
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Indianapolis, Indiana 46208

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7212 N. Shadeland Ave., #206
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CASE HISTORY LIST FOR CASE #49A04-8612-CV-00379
ED GOSSETT VS AUBURN NATIONAL BANK OF AUBURN, ET AL

JAMES MILTON SECREST 2625 N. MERIDIAN SUITE 302 INDIANAPOLIS IN 46208-0000 317-925-1660	GOSSETT, ED A
CHARLES REED SHEEKS SUITE 206 7212 N. SHADELAND INDIANAPOLIS, IN 46250-0000 317-842-5232	GOSSETT, ED A
JOHN BRIAN NIEDERHAUSER 777 CHAMBER COMMERCE BLDG. 320 NORTH MERIDIAN STREET INDIANAPOLIS, IN 46204-0000 317-639-4511	AUBURN NATIONAL BANK OF AUBURN E
STEVEN JAY MOSS 225 EAST CARMEL DR. CARMEL, IN 46032-0000 317-844-4693	AUBURN NATIONAL BANK OF AUBURN E
NO LAWYER	SANDA, FRANCIS M.

FILING DATE		O N P
12/23/86	APPELLANT'S PRE-APPEAL STATEMENT (3) CERTIFICATE OF SERVICE (3)	N N N .45
1/05/87	NO PRE-APPEAL CONFERENCE WILL BE HELD, PROCEED ACCORDING TO RULES OF APPELLATE PROCEDURE. PAUL H. BUCHANAN, JR., CHIEF JUDGE.	1.10
3/05/87	APPELLANT'S VERIFIED PETITION FOR EXTENSION OF TIME IN WHICH TO FILE THE RECORD OF PROCEEDINGS (2) CERTIFICATE OF SERVICE (2)	N N N .30
3/09/87	AFFIDAVIT OF COURT REPORTER (2)	N N N .30
3/11/87	3 VOLUME RECORD OF THE PROCEEDINGS AND TABLE OF CONTENTS VOLUME FILED.	N N N .90

3/11/87	APPELLANT'S PETITION FOR EXTENSION OF TIME TO FILE RECORD GRANTED TO AND INCLUDING MARCH 26, 1987. WESLEY W. RATLIFF, JR., CHIEF JUDGE. **** CLERK'S NOTE: THE RECORD WAS FILE-MARKED MARCH 11, 1987. ****	.44
4/10/87	APPELLANT'S BRIEF (9) PROOF OF SERVICE (2) MAIL. 3 VOL. RECORD RETURNED.	N N N .90
5/11/87	BRIEF OF APPELLEE, AUBURN NATIONAL BANK OF AUBURN (9) PROOF OF SERVICE MAIL (2) RECORD RETURNED 3 VOLUMES ROTUNDA	N N N .90
5/26/87	REPLY BRIEF OF APPELLANT (9) PROOF OF SERVICE (2) MAIL	N N N
5/26/87	FULLY BRIEFED INFORMATION FILED 12-23-86 F.B. 5-26-87 O.A. NONE TRANSMITTED **** 5-26-87 ****	N N N
10/19/87	ISSUED THE ENCLOSED OPINION.	N
10/19/87	1987 TERM THE JUDGMENT IS REVERSED AND REMANDED WITH INSTRUCTIONS TO VACATE THE JUDGMENT QUIETING TITLE IN SANDA AND ENTER JUDGMENT QUIETING TITLE IN GOSSETT. COSTS VERSUS AUBURN. CONOVER, J. MILLER, P.J. CONCURS. SHIELDS, P.J. CONCURS. 12 PAGES	N N 47.06
11/09/87	APPELLEE'S PETITION FOR REHEARING (6) APPELLEE AUBURN NATIONAL BANK OF AUBURN'S BRIEF IN SUPPORT OF PETITION FOR REHEARING (9) PROOF OF SERVICE (2) THREE (3) VOLUME RECORD RETURNED ROTUNDA	N N N 10.90
11/19/87	BRIEF OF APPELLANT OPPOSING PETITION FOR REHEARING (6) PROOF OF SERVICE (2)	N N N .90

12/07/87	APPELLEE'S PETITION FOR REHEARING DENIED. RATLIFF, C.J.	
12/28/87	(AUBURN NATIONAL BANK) PETITION FOR TRANSFER (6) BRIEF IN SUPPORT (9) SUBMISSION OF ADDITIONAL AUTHORITIES (6) PROOF OF SERVICE (2) ROTUNDA	N N N .90
1/07/88	APPELLANT ED GOSSETT'S BRIEF IN OPPOSITION TO PETITION FOR TRANSFER (6) PROOF OF SERVICE (2)	N N N 11.05
1/07/88	TRANSMITTED **** 01-07-88 *** *	N N N
5/04/88	SUBMISSION OF ADDITIONAL AUTHORITY TO PETITION FOR TRANSFER (6) PROOF OF SERVICE (2) MAIL	N N N .30
6/09/88	APPELLEES' PETITION FOR TRANSFER IS HEREBY DENIED. RANDALL T. SHEPARD, CHIEF JUDGE. ALL JUSTICES CONCUR.	
6/09/88	**** OPINION CERTIFIED ****	N N N
6/09/88	RECEIPT RETURNED	N N N
6/28/88	$$$$ INVOICE #667 BILLED TO JAMES MILTON SECREST @ $76.40	N N N
8/02/88	$$$$ RECEIPT #3499 TO HARRISON AND MOBERLY IN PAYMENT OF $76.40	N N N

I, Dan Heiser, Clerk of the Supreme Court and Indiana Court of Appeals do hereby certify that the above and foregoing is a full true, complete and correct copy of the original Docket Sheet as the same appears upon the record of said court, and in my custody as Clerk.

In testimony Whereof I have hereunto subscribed my name and affixed the Seal of said Court this day of August 31, 1988.

/s/ _____
Dan Heiser, Clerk

By /s/ _____
Carol McGowan, Deputy.

Relevant Indiana Statutes

Ind. Code 6-1.1-24-4 (1981) *Notice of sale to owner*

Sec. 4. (a) In addition to the notice required by section 3 of this chapter, the county auditor shall send a notice of the sale by certified mail to the owner or owners of the real property at their last known address. The county auditor shall prepare the notice in the form prescribed by the state board of accounts, and he shall mail the notice at least twenty-one (21) days before the day of sale.

(b) On or before the day of sale, the county auditor shall certify, on the tax sale record required by IC 1971, 6-1.1-25-8, that notice was given in the manner prescribed in this section.

Ind. Code 6-1.1-24-4.2 (1981) *Notice of sale to mortgagee*

Sec. 4.2. (a) In addition to the notice required by sections 3 and 4 of this chapter, the county auditor shall send a notice of sale to any mortgagee of real property which is subject to sale under the provisions of this chapter, if the mortgagee, annually, on a form prescribed by the state board of accounts, has:

(1) requested that notice of a sale of the real property be sent to him; and

(2) agreed to pay a fee to the county auditor, to cover the cost of sending notice.

The county council shall set the annual fee referred to in clause (2) of this section. However the fee may not exceed ten dollars ($10), for each separate parcel as carried on the tax records.

(b) The county auditor shall send the notice of sale to the mortgagee's last known address by certified mail. The county auditor shall prepare the notice in the form prescribed by the state board of accounts, and he shall mail the notice at least twenty-one (21) days before the date of sale.

Ind. Code 6-1.1-24-9 (1981) *Certificate of sale, contents; purchaser's lien; assignments*

Sec. 9. (a) Immediately after a tax sale purchaser pays his bid, as evidenced by the receipt of the county treasurer, or immediately after the county acquires a lien under section 6 of this chapter, the county auditor shall deliver a certificate of sale to the purchaser or to the county. The certificate shall be signed by the auditor and registered in his office. The certificate shall contain:

(1) a description of real property which corresponds to the description used on the notice of sale;

(2) the name of the former owner, if known;

(3) the name of the purchaser;

(4) the date of sale;

(5) the amount for which the real property was sold; and

(6) the date when the purchaser is first entitled to request a deed to the property.

(b) When a certificate of sale is issued under this section, the purchaser acquires a lien against the real property for the entire amount that he paid. The lien of the purchaser is superior to all liens against the real property which exist at the time the certificate is issued.

(c) A certificate of sale is assignable. However, an assignment is not valid unless it is indorsed on the certificate of sale, acknowledged before an officer authorized to take acknowledgments of deeds, and registered in the office of the county auditor. When a certificate of sale is assigned, the assignee acquires the same rights and obligations that the original purchaser acquired.

Ind. Code 6-1.1-25-1 (1981) *Redemption*

Sec. 1. An owner, occupant, lienholder, or other person who has an interest in real property sold under IC 1971, 6-1.1-24 may redeem the property at any time before a tax deed is issued by paying to the county treasurer the amount required for redemption under section 2 of this chapter.

Ind. Code 6-1.1-25-4 (1981) *Execution and delivery of deed to purchaser*

Sec. 4. (a) If a certificate of sale is issued to a purchaser under IC 6-1.1-24-9 and the real property is not redeemed within two (2) years after the date the certificate is issued, or within ninety (90) days from the date of the certificate of sale from a purchasing agency qualified under IC 36-7-17, the county auditor shall, upon receipt of the certificate and subject to the limitations contained in this chapter, execute and deliver a deed for the property to the purchaser. If a certificate of sale is issued to a county under IC 6-1.1-24-9 and the real property is not redeemed within one (1) year after the date the certificate is issued, the county auditor shall, upon receipt of the certificate and subject to the limitations contained in this chapter, issue a deed for the property to the county. The county auditor shall execute deeds issued under this section in the name of the state under his name and seal. If a certificate of sale is lost before the execution of a deed, the county auditor may execute and deliver a deed if he is satisfied that the certificate did exist.

(b) When a deed for real property is executed under this section, the county auditor shall cancel the certificate of sale and file the cancelled certificate in his office.

(c) When a deed is issued to a county under this section, the taxes for which the real property was offered for sale, and all subsequent taxes and penalities, [sic] shall be removed from the tax duplicate in the same manner that taxes are removed by certificate of error.

(d) A tax deed executed under this section vests in the grantee an estate in fee simple absolute, free and clear of all liens and encumbrances except the lien of the state for taxes and special assessments which accrue subsequent to the sale and which are not removed under subsection (c) of this section. The deed is prima facie evidence of:

(1) the regularity of the sale of the real property described in the deed;

(2) the regularity of all proper proceedings; and

(3) valid title in fee simple in the grantee of the deed.

Ind. Code 6-1.1-25-6 (1981) *Notice to former owner before tax deed is executed and delivered*

Sec. 6. (a) The county auditor shall send a notice by certified mail to the former owner of real property not more than sixty (60) days nor less than thirty (30) days before a tax deed for the property is executed and delivered under this chapter. The county auditor shall prepare the notice on the form prescribed by the state board of accounts. The notice shall contain:

(1) the name of the former owner as determined by reference to the transfer book of the county auditor;

(2) the description of the real property shown on the certificate of sale;

(3) a statement that the real property was sold at a tax sale;

(4) the date the real property was sold;

(5) the name of the purchaser;

(6) a statement that the former owner is entitled to redeem the real property;

(7) the amount of money required to redeem the real property;

(8) a statement that the purchaser, or his successors or assigns, is entitled to reimbursement for additional taxes or special assessments on the real property paid by him subsequent to the tax sale and before redemption;

(9) a statement that the real property has not been redeemed; and

(10) a statement that the purchaser, or his successors or assigns, is entitled to receive a deed for the real property if it is not redeemed before a certain date.

(b) The county auditor shall retain in his office a copy of such notice required by this section, and he shall certify on the

copy that the notice was mailed in the manner prescribed in this section and the date on which the notice was mailed.

Ind. Code 6-1.1-25-7 (1981) *Deadline for execution of deed*

Sec. 7. The holder of a certificate of sale, or his successors or assigns, shall have the county auditor execute a deed to the real property within four (4) years from the date of the sale. If the purchaser, or his successors or assigns, fails to have the county auditor execute a deed within that time period, the purchaser's lien against the real property terminates at the end of the time period. However, this section does not apply if the county is the holder of the certificate of sale.